

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD J. ANDREWW,
Petitioner

FILED
CLERKS OFFICE

v.

Civil Action No. 04-11895-REK 23 P 1:21

KENNETH NELSON,
Respondent

U.S. DISTRICT COURT
DISTRICT OF MASS.

PETITIONER'S REPLY PURSUANT TO 5(E)

Now comes the petitioner, Richard Andrew, a prisoner lawfully in the custody of the Massachusetts Department of Correction. In the above-entitled matter, pursuant to Habeas Corpus Rule 5(E), respectfully serves petitioner's reply to respondent's motion to dismiss pursuant to Fed.R.Civ.P 15(a) petitioner's first 28 U.S.C. 2254(b) filed on July 15, 2004.

In support of said reply, the petitioner states that the respondent failed to conform to the rules governing Federal Habeas Corpus 28 U.S.C 2254; Rule 5(b), which setsfourth the governing standard in all Federal Habeas Corpus cases. The respondent's "answer" is devoid of any procedural history in support of their claim that petitioner is "time-barred". [S]uch circumstances demonstrate the impracticality of addressing exhaustion and default issues in the context of a motion to dismiss based solely on the allegations contained in a Habeas Corpus. Such issues are better raised in the context of an "answer" whcih attaches all the requisite documentation and which clearly sets fourth procedure history of the case. Chavez vs. Morgan, 932 FSupp 1152 (5th cir. 1996). The rule *mandates that a respondent set fourth procedural history, so a court can have all relevant facts to a petition in order to fully consider a 28 U.S.C. 2254 petition. The motion to dismiss is void of any procedural history in support of their claim. *Rule 5(b), that the petitioner is time-barred pursuant to 28 U.S.C. 2244(d)(1). Nevertheless, petitioner reply's to the allegations setfourth in respondent's motion to dismiss. While the petitioner acknowledges that "[A]EDPA contains a statue of limitations...limiting to one year the time within which a person in custody pursuant to a judgement of a state court may apply for a writ of Habeas Corpus. See Gaskins vs. Duval, 183 F3D 8,9 (1st cir. 1999), and this limitation applies equally to prisoner's who conviction became final prior to the enactment of the AEDPA. Duncan vs. Walker, 533 U.S. 167 (2001), however, the limitations provision only applies to petitioner's who would be eligible for 28 U.S.C. 2254 petition.

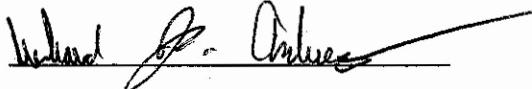
The petitioner prior to 2003 was, as dictated by 28 U.S.C. 2254 (c), ineligible to petition this court due to the fact that petitioner wasn't at thestates highest court and didn't exhaust hid remedies. See Scarpa vs. Dubois, 38 F3D 1,6 (1st cir. 1994) provision 28 U.S.C.

2254(c), states "an application shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning (or) this section, if he has the right under law of the state to raise, by any available procedure, the question presented. Here, the correct available procedure to petitioner was a motion to revise and revoke petitioner's sentence under Mass.R.CrimP 29, in which the petitioner filed a claim under the Sixth Amendment indentical to Commonwealth vs. Stubbs, 15 Mass.App.Ct. 955 (1985), the court dealt with petitioner's motion that was filed on January 31, 2001. And the Judges ruling Revise and Revoke petitioner's sentence on June 3, 2003 was granted, from the order the Commonwealth filed a petition under G.L.C. 211 § 3 and on June 9, 2004 the Commonwealth was successful to have the petitioner's original sentence reinstated. A month later the petitioner filed this 28 U.S.C 2254(a).

Pursuant to 28 U.S.C. 2254(b)(2), "[A]n application for writ of Habeas Corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in court of the state." Huenefeld vs. Maloney, FSupp.2d (D.Massx, 1999) (the petitioner had to exhaust state remedies before proceeding to Federal Court. See Rose vs. Lundy, 455 U.S. 509 (1982), thus, the provision of 28 U.S.C. 2244(d)(1) started to run the date the Supreme Judicial Court ("SJC") reinstated the petitioner's original sentence on June 9, 2004. See Carey vs. Saffold, 536 U.S. 214 (2002). The respondent's claim that petitioner is time-barred under 28 U.S.C. 2244(d)(1) must be denied.

Wherefore: The petitioner prays that this court grants, without delay, issues the writie.

RESPECTFULLY SUBMITTED


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Dated: August 18, 2005